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In the Supreme Court of the United States

OCTOBER TERM A.D. 1973

CLEMENS K. SHAPIRO, et al.,

Petitioners,

vs.

CHARLES J. BARRETT, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

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PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

Petitioners, Clemens K. Shapiro and Jerome Herman, d/b/a The Spot, on behalf of themselves and on behalf of all individual natural persons in Illinois, respectfully pray that a Writ of Certiorari be issued to review the judgment and opinion of the Illinois Supreme Court entered in this proceeding on April 25, 1973, after remand by this Court in *Lehnhausen* v. *Lake Shore Auto Parts Co.*, No. 71-685, consolidated with *Barrett* v. *Shapiro,* No. 71-691, reported in 409 U.S. 1103, holding in part: "Trustees and other fiduciaries, whether corporate or not, do not own property as natural persons, and they are not exempted from taxation by Article IX-A."

OPINIONS BELOW

The decision of the Illinois Supreme Court, which is the subject of this appeal is officially reported in 54 Ill. 2d 237, 296 N.E. 2d 342, and, along with a dissent thereto, is set forth at pages 4 and 9 *infra*. The majority opinion held that Article IX-A of Illinois Constitution of 1870, left taxable various categories of ownership of personal property, including trustees and other fiduciaries, while exempting the personal property "owned by a natural person or two or more natural persons, as joint tenants or tenants in common."

The decision of this Court reported in 409 U.S. 1103, is attached as Appendix "A" and the initial decision of the Illinois Supreme Court of July 9, 1971 reported in 49 Ill. 2d 137, 273 N.E.2d 592, along with a dissent thereto is attached as Appendix "B".

JURISDICTION

The supplemental opinion on remand in the Illinois Supreme Court was filed on April 25, 1973 along with a dissent filed therewith. Two petitions for rehearing were filed, one by the petitioners herein on May 14, 1973 and the other by the Illinois Attorney General. Those two petitions were denied on June 1, 1973.

This petition, filed within ninety (90) days of that date is respectfully submitted in accordance with Rules 21, 22 and 23 of the Revised Rules of the United States Supreme Court to demonstrate that the Supreme Court of the United States has jurisdiction of this appeal and that substantial federal questions are presented.

QUESTION PRESENTED

Is the Supplemental Opinion of the Illinois Supreme Court upon remand in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and offensive as well to Article I section 2 of the Illinois Constitution of 1970, insofar as that opinion purports to exclude individuals from *ad valorem* personal property taxation, but includes as taxable "trustees and other fiduciaries" even though the beneficiaries of those trusts, estates, etc., upon whom the incidence of this tax falls may be natural person individuals?

CONSTITUTIONAL PROVISIONS INVOLVED

Article IX-A of the 1870 Illinois Constitution, submitted to the electorate on November 3, 1970 and declared ratified on November 25, 1970, the text of which is set forth below, was found by the Illinois Supreme Court to include as taxable "trustees and other fiduciaries."

"Article IX-A

TAXATION OF PROPERTY

"§1. Taxation of personal property prohibited.

"Section 1. Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited *as to individuals.*"

SCHEDULE

"Paragraph 1. This amendment shall become effective January 1, 1971."

EXPLANATION OF AMENDMENT

"The amendment would abolish the personal property tax by valuation levied against individuals. It would not effect the same tax levied against corporations and other entities not considered in law to be individuals. The amendment would achieve this result by adding a new article to the Constitution of 1870 Article IX-A, thus setting aside existing provisions of Article IX, Section I, that require the taxation by valuation of all forms of property, real and personal or other, owned by individuals and corporations."

STATEMENT OF THE CASE.

The facts are not in dispute and are contained essentially in this Court's prior opinion reported in 409 U.S. 1103.

The sole remaining relevant facts are contained in the Supplemental Opinion of the Illinois Supreme Court. That Opinion is set forth in full herein.

OPINION

PER CURIAM: In July of 1971 this court rendered its opinion in these causes, holding that article IX-A which had been added to the Illinois Constitution of 1870 by amendment was invalid because it violated the equal protection clause of the fourteenth amendment to the constitution of the United States. *Certiorari* was granted by the Supreme Court of the United States, and the decision of this court was reversed and the causes remanded to this court for further proceedings not inconsistent with the opinion of the Supreme Court of the United States.

Thereafter, some of the parties to these causes requested immediate issuance of the mandate of this court to the circuit court of Cook County in order that proceedings might

there be taken by way of interpretation of the opinions of this court and the Supreme Court of the United States, with a view toward further appeals from the interpretation of the circuit court.

Because the public interest requires that any questions that may exist concerning the interpretation of the opinions of this court and the Supreme Court of the United States be promptly determined, the parties were directed to submit memoranda to this court stating their views.

The court has considered the memoranda that have been filed on behalf of the parties and other interested persons. In its opinion this court stated: "We conclude that the meaning of article IX-A is that *ad valorem* taxation of personal property owned by a natural person or by two or more natural persons as joint tenants or tenants in common is prohibited." (49 Ill.2d at 148.) This is the interpretation upon which the opinion of the Supreme Court of the United States was based.

The personal property thus left subject to taxation under article IX-A includes the following categories of ownership: partnerships, limited partnerships, joint ventures, professional associations, and professional service corporations. Trustees and other fiduciaries, whether corporate or not, do not own property as natural persons, and they were not exempted from taxation by article IX-A. Bank stock, like the shares of any other corporation, is exempt only when owned by a natural person or by two or more natural persons as joint tenants or tenants in common.

The causes are remanded to the circuit court of Cook County for further proceedings in accordance with this opinion.

Causes remanded.

REASONS FOR GRANTING THE WRIT

I.

THE SUPPLEMENTAL OPINION OF THE ILLINOIS SUPREME COURT UNCONSTITUTIONALLY CLASSIFIES TRUSTEES AND OTHER FIDUCIARIES HAVING NATURAL PERSONS AS THEIR BENEFICIARIES, AS TAXABLE ENTITIES, THEREBY EXCLUDING THEM FROM THE CONSTITUTIONAL EXEMPTION AFFORDED ALL "INDIVIDUALS" IN ILLINOIS FROM PERSONAL PROPERTY TAXATION.

The Illinois Supreme Court after the remand of this cause, following reversal of its initial decision, has created a constitutional question falling precisely within due process and equal protection provisions of the Fourteenth Amendment. The Illinois Court has categorized two classes —one of taxable entities and the other of individuals who are exempt from personal property taxation, but has included as taxable, trusts, estates and other fiduciaries even though they may hold personal property for the benefit of natural persons, including minors, incompetents and other "individuals." The Illinois court thereby ignores the well recognized fact that fiduciaries traditionally hold property for the use and benefit of others who are in law considered to be the *owners.*

The Illinois Supreme Court's premise that "Trustees and other fiduciaries, whether corporate or not, do not *own* property as natural persons . . ." (emphasis supplied) implies that these juristic conceptions *own* property in a capacity or capacities *other than* as "natural persons", *ergo:* they are not exempt from taxation by Article IX-A, because that Article exempts only personal property *owned* by "natural persons."

Petitioners respectfully submit that the assumption apparent in the court's premise is erroneous.

Trustees and other fiduciaries contrary to the assumption of "ownership" indulged in by the Illinois court, simply do not *own* property in any capacity, or by any definition, nor is "ownership" included in the reasons for which, and the purpose to be served by such offices, or the relationship of such office to the beneficiaries, or the circumference of control over the property of those beneficiaries.

Indeed, the concept of trusts or other fiduciaries, as commonly understood, is the establishment of a relationship whereby property *owned* by one party is *held* in trust for that party by another party.

"Trustee" is defined in Websters Third New International Dictionary Unabridged (1967), as:

> "1: one to whom something is entrusted; one trusted to keep or administer something . . .
>
> 2: (a) a person whether real or juristic to whom property is legally committed in trust;
>
> one holding legal title to property which he must administer for the benefit of a beneficiary as legally charitable or as lawful by statute;
>
> (b) one in whose hands the effects of another are attached by the trustee process . . ."

Ownership of property requires direction or approval from no one concerning its disposition. Trustees and other fiduciaries can *only* dispose of property held by them pursuant to direction or approval of the *owners* of that property or by direction of some legal authority to do so in *behalf* of such owners. The same is true of the proceeds resulting from the disposition of such property.

In Illinois, the term "trustee" has been interpreted in *Kennell* v. *Herbert,* 342 Ill. 464, 468 (1931) as follows:

> The term is a warning and a declaration to everyone who reads it that the person so named is not the owner of the property to which it relates, that he holds it for the use and benefit of another, and that he has no right to deal with it except in accordance with the terms of the trust. (citing cases)

It is also recognized in Illinois that the character of a trust involves a separation of the equitable right, title or interest from the legal ownership. The Illinois Appellate Court in *Merchants Nat. Bank of Aurora* v. *Frazier,* 329 Ill. App. 191, 200 (2nd Dist. 1946) acknowledged this separation in the following language:

> The opinion in *Weer* v. *Gand,* 88 Ill. 490, 493, quotes Story on Equity Jurisprudence, sec. 964, as follows: "A trust, in the most enlarged sense used in English jurisprudence, may be defined to be an equitable right, title or interest in property, real or personal, distinct from the legal ownership thereof; in other words, the legal owner holds the direct and absolute dominion over the property, in view of the law; but the income, profits or benefits thereof in his hands belong wholly or in part to others."

Strangers to a trust or estate or to any other fiduciary arrangement are thus put on notice that the person holding title is not in fact the owner.

It is the beneficiaries who *own* such property.

Consistent with the Illinois court's own interpretation, it then follows that the taxation of personal property owned by *natural person beneficiaries* is prohibited.

Denial to "natural person beneficiaries" of the exemption from personal property taxation accorded by the Illinois court to all other "natural persons" under the circumstances apparent here, purports a classification predicated upon a difference absent any distinction, and petitioners respectfully submit, creates, and as thus created, constitutes a denial of due process and equal protection of the law guaranteed them under the 14th Amendment to the Constitution of the United States and, as well, under Article I Section 2 of the Illinois Constitution of 1970.

II.

THE DISSENTING OPINION OF MR. JUSTICE GOLDENHERSH SUCCINCTLY STATES THE CONSTITUTIONAL INFIRMITIES OF THE ILLINOIS COURT'S MAJORITY OPINION.

Mr. Justice Goldenhersh's dissent is set forth in full as a reason alone why certiorari should be granted:

"MR. JUSTICE GOLDENHERSH, dissenting in part:

I dissent from the portion of the opinion which decides that "Trustees and other fiduciaries, whether corporate or not, do not own property as natural persons, and they were not exempted from taxation by article IX-A." As the result of this holding, personal property which would be exempt from taxation if the legal ownership were vested in individuals, severally, or as joint tenants or tenants in common, would lose its exempt status if held by a fiduciary, individual or corporate, while the beneficial ownership is vested in these same individuals, severally, jointly, or in common.

The most obvious and annoying anomaly which results from the majority's holding arises in connection with the estates of decedents. Under the majority's holding, property owned by an individual and therefore exempt, loses its exempt status during the period that it is held by the administrator or executor and regains its exempt status upon distribution to the individual heirs or legatees. An examination of the Principal and Income Act (Ill. Rev. Stat. 1971, ch. 30, par. 159 *et seq.*) in the light of the majority opinion will demonstrate the numerous injustices and inequities which will result from this decision.

Furthermore, the majority opinion will curtail, to a great extent, the effective use of trusts and the utilization of the provisions of the Uniform Gifts to Minors Act (Ill. Rev. Stat. 1971, ch. 3, par. 531 *et seq.*). Absent amendment or repeal of section 27a of the Revenue Act of 1939 (Ill. Rev. Stat. 1971, ch. 120, par. 508a) March 31 will become the magic date for termination, and April 2 the magic date for creation, of fiduciary estates. In no other area of taxation is a beneficiary penalized because the property of which he is the beneficial owner is held by a fiduciary, and courts and fiduciaries will now be confronted with the question of whether "men of prudence, discretion and intelligence" (Ill. Rev. Stat. 1971, ch. 148, par. 32) may safely counsel or approve the use of a device which has for so long performed service of inestimable value.

Of course, the simple solution to the problem is to hold that individuals who own the beneficial interest in personal property, severally, jointly or in common, are "natural persons" (49 Ill.2d 137, 148) within the contemplation of article IX-A and that property so owned is exempt. It would not be difficult to devise a return to be filed by fidu-

ciaries with respect to property held by them in which the exemption was claimed, and to do so would, in my opinion, more nearly achieve the intent of article IX-A than does the majority opinion."

Without mentioning the equal protection arguments as such, the above dissent cogently underscores the impropriety of attributing the loss of tax exempt status to "individuals" merely because a fiduciary holds their property, or because an individual dies and his executor holds the assets between his death and transfer to heirs or legatees.

This discrimination against fiduciaries and more particularly against beneficiaries thereof who are individuals is arbitrary, capricious and unreasonable. The classification of the Illinois court is not based on "real and substantial differences" for it is the character of the beneficial ownership and not merely the holding of bare legal title that is and should be controlling:

"But the classification must be reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920). "Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Morey* v. *Doud,* 354 U.S. 457, 464 (1957).

The classification of fiduciaries as taxable is palpably arbitrary and unreasonable without any constitutionally valid relation to the object of the Constitutional Amendment, Article IX-A—that is, to exempt *all* "individuals" from personal property taxation.

The arbitrary nature of this classification or method of classification is also apparent from the fact that the classification is based upon a factor extraneous to the basic issue of classification—that is, whether the *taxpayer*—that person who bears the burden of this tax—is an individual or non-individual.

Use of this arbitrary method of classification by the Illinois court effectively again reimposes the personal property tax on a portion of the class of individuals exonerated by Amendment Article IX-A, through this Court's decision and as such, clearly constitutes denial to such individuals of their rights to due process and equal protection of the laws guaranteed them by the Fourteenth Amendment to the Constitution of the United States. This Court should so hold.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully request the issuance of this Court's Writ of Certiorari in this case.

Respectfully submitted,

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APPENDIX "A"

SUPREME COURT OF THE UNITED STATES

Nos. 71-685 and 71-691

ROBERT J. LEHNHAUSEN,

Petitioner,

71-685 *vs.*

LAKE SHORE AUTO PARTS CO., et al.

EDWARD J. BARRETT, County Clerk of Cook County, Illinois, et al.,

Petitioners,

71-691 *vs.*

CLEMENS K. SHAPIRO et al.

On Writs of Certiorari to the Supreme Court of Illinois.

[February 22, 1973]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In 1970 the people of Illinois amended her constitution[1] adding Art. IX-A to become effective January 1, 1971, and reading:

> "Not withstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited as to individuals."

There apparently appeared on the ballot when Art. IX-A was approved the following:

> "The amendment would abolish the personal property tax by valuation levied against individuals. It

[1] In 1969 the Illinois Legislature had provided for the submission of the proposed amendment to a referendum vote.

would not effect the same tax levied against corporations and other entities not considered in law to be individuals. The amendment would achieve this result by adding a new article to the Constitution of 1870, Article IX-A, thus setting aside existing provisions of Article IX, Section 1, that require the taxation by valuation of all forms of property, real and personal or order, owned by individuals and corporations."

Respondent Lake Shore Auto Parts Co., a corporation, brought an action against Illinois officials on its behalf and on behalf of all other corporations and "non-individuals" subject to the personal property tax, claiming it violated the Equal Protection Clause of the Fourteenth Amendment since it exempts from personal property taxes all personal property owned by individuals but retains such taxes as to personal property owned by corporations and other "non-individual." The Circuit Court held Art. IX-A unconstitutional as respects corporations by reason of the Equal Protection Clause of the Fourteenth Amendment.

Shapiro and other individuals also brought suit alleging they are natural persons who own personal property, one for himself and his family, one as a sole proprietor of a business, and one as a partnership. A different trial judge entered an order in these cases dismissing the complaints except as to Shapiro and members of his class. The trial judge held that all other provisions of Illinois law imposing personal property taxes on property owned by corporations and other "non-individuals" were unaffected by Art. IX-A, in spite of the statement on the ballot, quoted above.

All respondents in both cases appealed to the Illinois Supreme Court, which held that Art. IX-A did not affect all forms of real and personal property taxes but only personal

property taxes on individuals, which it construed to mean "ad valorem taxation of personal property owned by a natural person or by two or more persons as joint tenants in common." 48 Ill. 2d 137, 148. As so construed the Illinois Supreme Court held that the tax violated the Equal Protection Clause of the Fourteenth Amendment. *Id.*, at 151, one Justice dissenting.[2] The cases are here on petitions for writs of certiorari which we granted. 406 U.S.—.

The Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals or entities different from the others. The test is whether the difference in treatment is an invidious discrimination. *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 666. Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled,[3] the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation. As stated in *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 526-527:

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[2] The result was either to reverse with directions to dismiss the complaints or to affirm judgment that did dismiss the complaints. Those two cases were heard by the Illinois Supreme Court along with a petition to file original suit with that court by one Maynard, who owned nonbusiness personal property and by three school districts. That petition was dismissed.

[3] Classic examples are the discriminatory taxes on newspapers struck down under the First Amendment (*Grosjean* v. *American Press Co.*, 797 U.S. 733) or by reason of the fact that they discriminated against interstate commerce or required license taxes to engage in interstate commerce. See *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157.

> "The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity to reference to composition, use or value."

In that case we used the phrase "palpably arbitrary" or "invidious" as defining the limits placed by the Equal Protection Clause on state power. *Id.*, at 530. State taxes which have the collateral effect of restricting or even destroying an occupation or a business have been sustained, so long as the regulatory power asserted is properly within the limits of the state-federal regime created by the Constitution. *Magnano Co.* v. *Hamilton*, 292 U.S. 40, 44-47. When it comes to taxes on corporations and taxes on individuals great leeway is permissible so far as equal protection is concerned. They may be classified differently with respect to their rights to receive or earn income. In *Lawrence* v. *State Tax Commission*, 286 U.S. 276, 283, a state tax relieved domestic corporations of an income tax derived from activities carried on outside the State, but imposed the tax on individuals obtaining such income. We upheld the tax against the claim that it violated the Equal Protection Clause, saying:

> "We cannot say that investigation in these fields would not disclose a basis for the legislation which would lead reasonable men to conclude that there is just ground for the difference here made. The existence, unchallenged, of differences between the taxation of incomes of individuals and of corporations in every federal revenue act since the adoption of the Sixteenth Amendment demonstrates that there may be." *Id.*, at 283-284.

It is true that in *Quaker City Cab Co.* v. *Pennsylvania*, 277 U.S. 389, the Court held that a gross receipts tax levied on corporations doing a taxi business violated the Equal Protection Clause of the Fourteenth Amendment, when no such tax was levied on individuals and partnerships operating taxicabs in competition with the corporate taxpayers. Justice Holmes, Justice Brandeis, and Justice Stone dissented. *Id.*, 403-412. Justice Holmes stated:

> "If usually there is an important difference of degree between the business done by corporations and that done by individuals, I see no reason why the larger businesses may not be taxed and the small ones disregarded, and I think it would be immaterial if here and there exceptions were found to the general rule.... Furthermore if the State desired to discourage this form of activity in corporate form and expressed its desire by a special tax I think that there is nothing in the Fourteenth Amendment to prevent it."

Each of these dissenters thought *Flint* v. *Stone Tracy Co.*, 220 U.S. 107, should govern *Quaker City Cab.* The *Flint* case involved a federal tax upon the privilege of doing business in a corporate capacity, but it was not laid on businesses carried on by a partnership or private individual. It was therefore contended that the tax was "so unequal and arbitrary" as to be beyond the power of Congress. *Id.*, at 158. We had not yet held that the Fifth

Amendment in its use of due process carries a mandate of equal protection.[4] But the Court in *dictum* stated: that it could not be said,

> "... even if the principles of the Fourteenth Amendment were applicable to the present case, that there is no substantial difference between the carrying on of business by the corporations taxes, and the same business when conducted by a private firm or individual. The thing taxed is not the mere dealing in merchandise, in which the actual transactions may be the same, whether conducted by individuals or corporations, but the tax is laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals. These advantages are obvious, and have led to the formation of such companies in nearly all branches of trade. The continuity of the business, without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors, the general absence of individual liability, these and other things inhere in the advantages of business thus conducted, which do not exist when the same business is conducted by private individuals or partnerships. It is this distinctive privilege which is the subject of taxation, not the mere buying or selling or handling of goods which may be the same, whether done by corporations or individuals." *Id.*, at 161-162.

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[4] See *Bolling* v. *Sharpe*, 347 U.S. 497, decided May 17, 1954, which held that federal discrimination (in that case racial in nature) may be so arbitrary as to be violative of due process as used in the Fifth Amendment.

While *Quaker City Cab* followed *Flint*, cases following *Quaker City Cab* have somewhat undermined it. *White River Co.* v. *Arkansas*, 279 U.S. 692, sustained a state statute for collection of back taxes on lands owned by corporations but not individuals. The Court sustained the tax. Justice Butler, Chief Justice Taft, and Justice van Devanter dissented, asserting that *Quaker City Cab* was not distinguishable. The majority made no effort to distinguish *Quaker City Cab* beyond saying that it did not involve, as did *White River*, a tax on back taxes.

In *Rapid Transit Co.* v. *New York*, 303 U.S. 573, an excise tax was levied on every utility but not on other business units. In sustaining the tax against the claim of lack of equal protection the Court said:

> "Since carriers and other utilities with the right of eminent domain, the use of public property, special franchises or public contracts, have many points of distinction from other businesses, including relative freedom from competition, especially significant with increasing density of population and municipal expansion, these public service organizations have no valid ground by virtue of the equal protection clause to object to separate treatment related to such distinctions." *Id.*, at 579.

We reached the same result in *Nashville C. & St. L. R. Co.* v. *Bronny*, 310 U.S. 362, where Tennessee had used one system for making assessments under its ad valorem tax law as respects most taxpayers and a totally different one for public service corporations. So far as equal protection was concerned we said that the grievance of the partic-

ular complainant was "common to the whole class" and not "invidious to a particular taxpayer."[5] *Id.*, at 368.

Approval of the treatment "with that separateness" which distinguishes public service corporations from others, *id.*, at 365, leads us to conclude in the present cases that making corporations and other like entities liable for ad valorem taxes on personal property but not individuals does not transcend the requirements of equal protection.

In *Madden* v. *Kentucky*, 309 U.S. 83, a State laid an ad valorem tax of 50¢ per $100 on deposits in banks outside the State and only 10¢ for $1,000 in deposits within the State. The classification was sustained against the charge of invidious discrimination, the Court noting that "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Id.*, at 88. There is a presumption of constitutionality which can be overcome "only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. *Ibid.* And the Court added,

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[5] In *Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U.S. 412, a State classified chain stores for purposes of a chain store tax according to the number of stores—inside and outside the State. The Court sustained the tax saying, "The statute bears equally upon all who fall into the same class, and this satisfies the guaranty of equal protection." *Id.*, at 424. In *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495, a State laid an unemployment tax on employers, excluding, *inter alia*, agriculture, domestic service, crews of vessels on navigable waters, eleemosynary institutions. The Court sustained the tax saying "This Court has repeatedly held that inequalities which result from singling out of one particular class for taxation or exemption infringe no constitutional limitation." *Id.*, at 59. And it added "A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it. *Ibid.*

"The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Ibid.* That idea has been elaborated. Thus in *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495, the Court in sustaining an unemployment tax on employers [6] said:

> "A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function." *Id.* at 510.

Illinois tells us that the individual personal property tax was discriminatory, unfair, almost impossible to administer, and economically unsound. Assessment practices varied from district to district. About a third of the individuals paid no personal property taxes at all, while the rest paid on their bank accounts, automobiles, household furniture and other resources, and in rural areas they paid on their livestock, grain, and farm implements as well. As respects corporations, the State says, the tax is uniformly enforceable. Illinois says, moreover, that Art. IX-A is only the first step in totally eliminating the ad valorem personal tax by 1979 but for fiscal reasons it was impossible to abolish the tax all at once.

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[6] Note 5, *supra*.

We could strike down this tax as discriminatory only if we substituted our judgment on facts of which we can be only dimly aware for a legislative judgment that reflects a vivid reaction to pressing fiscal problems. *Quaker City Cab Co.* v. *Pennsylvania* is only a relic of a bygone era. We cannot follow it and stay within the narrow confines of judicial review, which is an important part of our constitutional tradition.

Reversed.

APPENDIX "B"

Opinion of Illinois Supreme Court — July 9, 1971.

LAKE SHORE AUTO PARTS CO., an Illinois Corporation, et al.,

Appellees,

vs.

BERNARD J. KORZEN, County Treasurer and ex officio County Collector of Cook County, et al.,

Appellants.

EUGENE L. MAYNARD, et al.,

Plaintiffs,

vs.

EDWARD J. BARRETT, County Clerk of Cook County, et al.,

Defendants.

CLEMENS K. SHAPIRO, et al.,

Appellants,

vs.

EDWARD J. BARRETT, County Clerk of Cook County, et al.,

Appellees.

Nos. 44199, 44308, 44432 Cons.

Mr. JUSTICE SCHAEFER delivered the opinion of the court.

These consolidated cases present issues concerning the construction and the validity of Article IX-A which was added to the Constitution of 1870 by referendum vote at

the November 1970 election. On June 30, 1969, the Senate and the House of Representatives concurred in the adoption of Senate Joint Resolution No. 30, which provided for the submission of the proposed amendment to a referendum vote. Senate Joint Resolution No. 30 (Senate Journal, June 30, 1969, p. 3476) is as follows:

SENATE JOINT RESOLUTION NO. 30

Resolved, By the Senate of the Seventy-sixth General Assembly of the State of Illinois, the House of Representatives concurring herein, that there shall be submitted to the electors of the State for adoption or rejection at the next election of members of the General Assembly of the State of Illinois, in the manner provided by law, a proposition to add Article IX-A to the Constitution, the added Article to read as follows:

ARTICLE IX-A

Section 1. Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited *as to individuals.*

SCHEDULE

Paragraph 1. This amendment shall become effective January 1, 1971.

The explanation of the amendment which appeared upon the referendum ballot is as follows:

"The amendment would abolish the personal property tax by valuation levied against individuals. It would not affect the same tax levied against corporations and other entities not considered in law to be individuals. The amendment would achieve this result by adding a new article to the Constitution of 1870, Article IX-A, thus setting aside existing provisions in Article IX, Section 1, that require the taxation by valuation of all forms of property, real and personal or other, owned by individuals and corporations."

Subsequently, on May 19, 1970, the Senate adopted Senate Joint Resolution No. 67 (Senate Journal May 19, 1970, p. 6) which contained a further statement of the intention of the General Assembly in adopting Senate Joint Resolution No. 30. Senate Joint Resolution No. 67 was concurred in by the House of Representatives on May 29, 1970 (Senate Journal May 29, 1970, p. 149). It reads as follows:

Senate Joint Resolution No. 67

RESOLVED, BY THE SENATE OF THE SEVENTY-SIXTH GENERAL ASSEMBLY OF THE STATE OF ILLINOIS, THE HOUSE OF REPRESENTATIVES CONCURRING HEREIN, that, in adopting Senate Joint Resolution No. 30, which submits to the electors of this State a constitutional amendment prohibiting the taxation of personal property by valuation as to individuals, it was the intention of this General Assembly to abolish the ad valorem taxation of personal property owned by a natural person or by two or more natural persons, and that, by the use of the phrase "as to individuals", this General Assembly intended to mean a natural person, or two or more natural persons as joint tenants or tenants in common.

The first of the three consolidated actions that are before us was filed by Lake Shore Auto Parts Co., a corporation, on December 9, 1970. The complaint named as defendants the county clerk of Cook County, the county assessor, the county collector and the members of the board of appeals of that county, as well as the director of the Department of Local Government Affairs of the State. It alleged that it was filed as a class action on behalf of the plaintiff (hereinafter Lake Shore) and on behalf of all other corporations and other "non-individuals"

subject to personal property tax. It asserted that the new Article IX-A violates the fourteenth amendment to the Constitution of the United States because its effect "is to exonerate from ad valorem personal property taxation, on and after January 1, 1971, all personal property owned by 'individuals', while authorizing and requiring the continued ad valorem taxation of all personal property owned by entities other than 'individuals.'" It also alleged that the provisions of Article IX-A immediately became a part of and amended the Revenue Act of 1939, so that that statute "imposes ad valorem taxes only with respect to personal property owned by corporations and other entities which are not 'individuals' within the meaning of said Article IX-A." The complaint prayed for a decree "finding and declaring that the provisions of the Revenue Act of 1939 * * *, as amended by Article IX-A of the Constitution of Illinois, are unconstitutional, invalid and unenforceable insofar and to the extent that such statute purports to impose ad valorem taxes with respect to personal property owned by plaintiff and all corporations and other 'non-individuals' who are members of the class which plaintiff represents." An injunction, as well as relief appropriate to a class action, was also sought.

The answers of the defendants denied the legal conclusions asserted by the plaintiff. They did not admit the allegations that related to the representative character of the action, but they did not dispute any allegations of fact that related to the basic issues.

All parties moved for summary judgment, and the trial court entered an order on March 30, 1971, granting the basic relief prayed for in the complaint, but reserving jurisdiction to determine the class aspect of the action. The order also found that Article IX-A is not applicable to

personal property taxes, the assessment of which was commenced prior to January 1, 1971. The defendant, Robert J. Lehnhausen, Director of the Department of Local Government Affairs of the State of Illinois, has appealed, and the plaintiff has cross appealed from that portion of the order that related to the particular taxes to which the court's order was applicable.

A petition seeking leave to file an original action in this court was filed on May 10, 1971 on behalf of Eugene L. Maynard, "a natural person, citizen and taxpayer of the State of Illinois," and also on behalf of one high school district and three grade school districts. Leave to file was granted on May 12, 1971. The defendants are those state and county officers who are defendants in the Lake Shore case. The complaint, which sought a declaratory judgment and other relief, alleges the adoption of Article IX-A. It is suggested that "the *Lake Shore* case will come to the Court in a flawed condition in that it will not properly present the parties and arguments essential for a full determination of the important revenue question. * * * Without the presence of Eugene L. Maynard, neither the presence nor the position of a natural person will be adequately presented to this Court." The complaint alleged that it was filed by Maynard, who is alleged to own nonbusiness personal property, on behalf of himself and all others similarly situated. It also alleged that it was filed on behalf of the named public bodies for themselves and all other public bodies which receive proceeds from personal property taxation.

The deficiencies in parties and in legal arguments in the *Lake Shore* case is said to lie in the fact that the only plaintiff in that case is a corporation, and in the fact that the complaint in that case does not contain a direct

request for a declaration of the unconstitutionality of Article IX-A. "The pleadings of that case place into question only certain sections of the Illinois Revenue Act. The attack is made upon these sections as affected by the passage of Article IX-A rather than upon the constitutionality of the Article itself. * * * If the Court considers the *Lake Shore* case without additional parties and arguments, it may be foreclosed from ruling on the central issue of constitutionality of the Amendment."

No new facts were alleged in the Maynard case, and the defendant Lehnhausen has conceded the factual questions and filed a brief to stand as its answer in this case. The brief on behalf of the defendant county officers appears similarly to have been intended to stand as a motion to dismiss the complaint.

Another action was instituted by a complaint for declaratory judgment which was filed in the circuit court of Cook County on May 8, 1971, on behalf of several plaintiffs. Clemens K. Shapiro alleged that he is a natural person who owns personal property in his own name and real property jointly with his wife, none of which property is owned or used for purposes of business, and all of which property is owned and used for his personal enjoyment and that of his family. Jerome Herman alleged that he is a natural person and operates and conducts a business as a sole proprietor. Guy S. Ross and Eugene D. Ross allege that they are natural persons and operate, as a partnership, a business which owns property. M. Weil and Sons, Inc., a corporation, alleges that it is the owner of property situated in Cook County.

The complaint alleges that each of the plaintiffs is acting in a representative capacity on behalf of all others similarly situated. The defendants are those state and county

officers who were named in the Lake Shore complaint. The complaint alleges the adoption of Article IX-A and asserts various interpretations of that Article, some of which are advanced by all of the plaintiffs and others by one or another of the plaintiffs. To this complaint the defendant Lehnhausen, Director of the Department of Local Government Affairs, filed a motion to dismiss on May 9, 1971. He also filed a "Petition for Instructions" which recited that the Lake Shore and Maynard cases were pending in the Supreme Court of Illinois, asserted that the issues in all of the three cases were substantially the same, and that it "would appear to be a duplication of effort for this Court to consider the issues involved in the case at bar [the Shapiro case] while at the same time the Illinois Supreme Court has essentially the same issues before it for consideration." The petition for instructions suggested that the Shapiro case be held in abeyance for the determination of the cases already pending before the Supreme Court. No order was entered with respect to this petition. On May 19, 1971, a motion to strike was filed in behalf of the defendant county officers. On May 28, 1971, an order was entered, by a judge other than the judge who heard the Lake Shore case, finding that the action was properly maintained as a class action and that each plaintiff had standing to bring the action in its own behalf and was a proper representative of the class he purported to represent. The order found that Article IX-A "is free of the ambiguity and uncertainty of intendment charged by the plaintiffs, and that its intendment is clearly declared to prohibit the taxation of personal property by valuation exclusively as to natural persons, where that property is used, by them, for the personal enjoyment of themselves and their families." Except as to the plaintiff Clem-

ens K. Shapiro and members of his class, the complaint was dismissed. All of the plaintiffs in the Shapiro case have appealed from this judgment.

The plaintiffs in the Maynard and Shapiro cases justify the institution of their actions upon the ground that there are deficiencies as to parties and as to legal propositions in the Lake Shore case which might, without the assistance which they volunteer to supply, preclude the possibility of full consideration of the issues by this court. That it is not necessary that each person or group of persons favorably or unfavorably affected by a legislative classification be made parties to an action challenging the validity of that classification is apparent. Major cases involving discrimination of the sort here alleged have not required the presence, as parties, either in person or by representative, of all those affected. See, *e.g.*, *Lawrence* v. *State Tax Com. of Miss.* (1932), 286 U.S. 276, 52 S. Ct. 556, 76 L. Ed. 1102.

There are no factual issues in the present cases, and the order of this court which consolidated the Lake Shore and Maynard cases provided: "Counsel may brief and argue all issues as to the validity and effect of the constitutional amendment known as Article IX-A of the Constitution of 1870." (See *Hux* v. *Raben* (1967), 38 Ill. 2d 223.) Additional class actions were not necessary to place before the court all pertinent legal theories. We shall, however, consider the arguments advanced by counsel in those cases.

Neither the plaintiffs in the Maynard case nor those in the Shapiro case are content with the interpretation of Article IX-A arrived at by Judge Walter P. Dahl in the Lake Shore case. That interpretation was that the new Article "purports to prohibit the taxation of personal

property by valuation as to 'individuals', and only as to 'individuals,' while leaving unaffected those provisions of the Illinois Constitution and the Revenue Act of Illinois * * * which imposed such personal property taxes as to property owned by corporations and other 'non-individuals.' "

One alternative construction, advanced by the plaintiffs, in the Shapiro case, is that the "Illinois" Constitution of 1870, as amended by the addition of Article IX-A, specifically prohibits, and declares to be unconstitutional the imposition in Illinois of the property taxes imposed by Article IX, Section 1, on all forms of property, real and personal or other, regardless of the ownership of that property or the use to which that property is put by its owner." This construction is achieved by disregarding the fact that Article IX-A is clearly concerned only with the taxation of personal property, and by concentrating upon the fact that the last sentence in the official explanation which appeared upon the ballot at the election on November 3, 1970, when Article IX-A was approved, mentioned taxes upon both real and personal property. That explanation was as follows:

> "The amendment would abolish the personal property tax by valuation levied against individuals. It would not affect the same tax levied against corporations and other entities not considered in law to be individuals. The amendment would achieve this result by adding a new article to the Constitution of 1870, Article IX-A, thus setting aside existing provisions of Article IX, Section 1, that require the taxation by valuation of all forms of property, real and personal or other, owned by individuals and corporations."

The last sentence of the explanation, however, is not a part of the amendment, and its reference to real property taxes

was made in describing the existing provisions of Article IX, Section 1, which are modified by Article IX-A.

Based upon the circumstance that the phrase "as to individuals" is printed in italics in Article IX-A, the Maynard plaintiffs turn to materials other than the legislative explanations in a search for a technical meaning. They say: "The unusual circumstance that the words 'as to individuals' are italicized in the constitutional amendment, an unprecedented practice in constitutional drafting, strongly suggests that the General Assembly, in drafting Senate Joint Resolution No. 30 used the word 'individuals' as one having established technical significance and usage in the classification of taxpayers upon whom personal property taxes have been imposed."

They purport to find the technical meaning that they seek in the circumstance that two different forms, administratively prescribed, have been used for personal property tax returns. One form is to be used by "individuals, partnerships, and unincorporated associations owning or controlling personal property used in agriculture, and all individuals owning or controlling any personal property which is not owned or used in connection with any business (other than agriculture) * * *." The other form is to be used by "[p]roprietorships, partnerships and unincorporated associates engaged in business (other than agriculture) * * *." On the assumption that the word "individuals" was intended to have an established technical meaning because it was printed in italics, the Maynard plaintiffs, and the Shapiro plaintiffs as well, argue that the word "individuals" was used to denote a class of natural persons owning personal property not used in business.

There is, however, a more prosaic explanation for the fact that the words "as to individuals" are printed in italics. When Senate Joint Resolution No. 30 was originally introduced on April 29, 1969, the proposed Article IX-A read as follows: "Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited." (Senate Journal, April 29, 1969, p. 1038.) On May 15, 1969, Senate Joint Resolution No. 30 was amended "by striking the period and adding the following: 'as to individuals.'" Senate Journal, May 15, 1969, pp. 1407-8.

The added words were placed in italics in accordance with routine legislative practice, which contemplates that in the case of amendments, new material is to be italicized. The rules of the Senate of the 76th General Assembly provided: "All resolutions originated in the Senate proposing amendments to the Constitution shall be ordered printed and shall be printed in the same manner in which bills are printed." (Senate Journal, Feb. 18, 1969, p. 163.

As to bills, they provided: "Senate Bills and House Bills in the Senate shall be printed with new matter in italics and omitted or superseded matter enclosed in brackets or underlined." Senate Journal, Feb. 18, 1969, p. 161.

There is thus no underpinning for the argument that the General Assembly intended that the word "individuals" should be given an artificial meaning. The official explanations, which are not discussed in the Maynard brief, definitely negative such an intention. We have examined the other materials to which the Maynard and Shapiro plaintiffs have referred, but have found nothing which persuades us that the words of Article IX-A should be given anything other than their natural meaning.

We conclude that the meaning of Article IX-A is that ad valorem taxation of personal property owned by a natural person or by two or more natural persons as joint tenants or tenants in common is prohibited.

The Maynard case plaintiffs and all of the Shapiro case plaintiffs, with the exception of Shapiro, contend that Article IX-A, so construed, violates the equal protection clause of the fourteenth amendment to the constitution of the United States. Lake Shore contends that it is the Revenue Act, which must be regarded as amended by Article IX-A, rather than the Article itself, which violates the equal protection clause. We shall first consider the basic question of the validity of the discrimination effected by Article IX A.

The new Article classifies personal property for the purpose of imposing a property tax by valuation, upon a basis that does not depend upon any of the characteristics of the property that is taxed, or upon the use to which it is put, but solely upon the ownership of the property. If the property is owned by A, it is taxable; if it is owned by B, it cannot be taxed. Of course, the equal protection clause of the fourteenth amendment does not prohibit classification, and absolute precision is not required of the states in drawing the lines between classes. Nevertheless, a state may not, under the guise of classification, arbitrarily discriminate against one and in favor of another similarly situated.

The Supreme Court of the United States has thus described the governing principles:

> "Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close

distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U.S. 232, 237; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U.S. 283, 293; • • • *State Board of Tax Comm'rs of Indiana* v. *Jackson*, 283 U.S. 527, 537. 'To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure.' *Ohio Oil Co.* v. *Conway, supra*, 281 U.S., at 159.

"But there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of legislation.' *Royster Guano Co.* v. *Virginia*, 253 U.S. 415; *Louisville Gas & Electric Co.* v. *Coleman*, 277 U.S. 37; *Air-Way Electric Applicance Corp.* v. *Day*, 266 U.S. 71, 85; *Schlesinger* v. *Wisconsin*, 270 U.S. 230, 240; *Ohio Oil Co.* v. *Conway*, 281 U.S. 146, 160 • • •."

Allied Stores of Ohio, Inc. v. *Bowers*, (1959), 358 U.S. 522, 526-27, 79 S. Ct. 437, 3 L. Ed. 2d 480, 484-85.

When classifications are reasonable, it is because of differences in the nature of the property or in the use to which it is put. The nature of the tax is important, too, for what may be a reasonable classification for a license, or for a privilege tax, is not necessarily a reasonable classification for a property tax.

Mr. Justice Brandeis stated the criterion this way in his dissenting opinion in *Quaker City Cab Co.* v. *Pennsylvania*, 277 U.S. 389, 406, 48 S. Ct. 553, 72 L.Ed. 927, 932: "In

other words, the equality clause requires merely that the classification shall be reasonable. We call that action reasonable which an informed, intelligent, just-minded, civilized man could rationally favor. In passing upon legislation assailed under the equality clause we have declared that the classification must rest upon a difference which is real, as distinguished from one which is seeming, specious, or fanciful, so that all actually situated similarly will be treated alike; that the object of the classification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of the State; and that the difference must bear a relation to the object of the legislation which is substantial, as distinguished from one which is speculative, remote or negligible."

Article IX-A must be read against the scheme of property taxation established pursuant to Article IX of the Constitution of 1870, which, with respect to property taxes contemplates the levy of "a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property * * *." (Constitution of 1870, Article IX, Sec. 1.) Taxes levied by municipal corporations are required to be "uniform in respect to persons and property, within the jurisdiction of the body imposing the same." (Constitution of 1870, Article IX, Sec. 9.) The permissible exemptions from taxation are thus described. "The property of the state, counties, and other municipal corporations, both real and personal, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes, may be exempted from taxation; but such exemption shall be only by general law. * * *" Constitution of 1870, Article IX, Sec. 3.

Against this background the incongruity of the prohibition contained in Article IX-A is apparent. It cannot rationally be said that the prohibition promotes any policy other than a desire to free one set of property owners from the burden of a tax imposed upon another set. All of the arguments in favor of the abolition of the personal property tax upon the property owned by natural persons apply with equal force in favor of the abolition of that tax upon the property owned by others. For the purpose of a tax by valuation upon the ownership of real or personal property, the identity of the owner is a neutral consideration, as is his status as sole proprietor, joint tenant, tenant in common, partner (Ill. Rev. Stat. 1969, ch. 106½, par. 25), limited partnership (Ill. Rev. Stat. 1969, ch. 106½, par. 61), member of a professional service corporation (Ill. Rev. Stat. 1969, ch. 32, par. 415-1 *et seq.*), or of a professional association (Ill. Rev. Stat. 1969, ch. 106½, par. 101 *et seq.*; see Sup. Ct. Rule 721; 43 Ill. 2d, Rule 721).

We hold, therefore, that the discrimination produced by Article IX-A violates the equal protection clause of the fourteenth amendment. Apart from that discrimination, the validity of the Revenue Act is not challenged, and we hold that it is Article IX-A which must fall. The validity of Article IX of the Constitution and of the Revenue Act are therefore not affected.

The judgment of the circuit court of Cook County in No. 44199 (Lake Shore) is reversed, and the cause is remanded to that court with directions to dismiss the complaint. Insofar as the judgment of the circuit court in No. 44432 (Shapiro) dismissed the complaint as to all of the plaintiffs other than Clemens K. Shapiro, it is affirmed; insofar as that judgment sustained the complaint as to

Clemens K. Shapiro, it is reversed and the cause is remanded to that court with directions to dismiss the complaint. In No. 44308 (Maynard), the complaint is dismissed.

No. 44199. *Reversed and remanded with directions.*

No. 44432. *Affirmed in part; reversed in part, and remanded with directions.*

No. 44308. *Complaint dismissed.*

(Lake Shore Auto Parts Co. v. Korzen, Nos. 44199, 44308, 44432)

MR. JUSTICE DAVIS, dissenting:

The majority opinion holds that our State Constitution of 1870, as modified by Article IX-A, may not validly classify exemptions from ad valorem personal property taxation on the basis of the ownership of the property, and that such exemption may be made only upon a classification based upon the nature of the property or its use. I dissent from this pronouncement.

It is clear that the United States Constitution imposes no particular modes of taxation upon the states and leaves them unrestricted in their power to tax those domiciled within their borders so long as the tax imposed is upon property within the state, or on privileges enjoyed there, and so long as the tax is not so palpably arbitrary or unreasonable as to infringe upon the equal protection and due process requirements of the fourteenth amendment. *Lawrence* v. *State Tax Commission of Mississippi*, 286 U.S. 276, 284, 52 S. Ct. 556, 559, 76 L. Ed. 1102, 1105.

The majority opinion recognizes that "the equal protection clause of the fourteenth amendment does not prohibit classification, and absolute precision is not required

of the states in drawing the line between classes"; and that, "nevertheless, a state may not, under the guise of classification, arbitrarily discriminate against one and in favor of another similarly situated." This general rule is found in the quotation from *Allied Stores of Ohio* v. *Bowers,* 358 U.S. 522, 79 S. Ct. 437, 3 L. Ed. 2d 480, cited by the majority. The rule has been expressed and exemplified many times in varying terms. Examples are: "Any classification of taxation is permissible which has reasonable relation to a legitimate end of governmental action." (*Welch* v. *Henry,* 305 U.S. 134, 144, 59 S. Ct. 121, 124, 83 L. Ed. 87, 92); "It is a salutary principle of judicial decision, * * * that the burden of establishing the unconstitutionality of a statute rests on him who assails it, and that courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators. A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it." (*Metropolitan Casualty Inc. Co.* v. *Brownell,* 294 U.S. 580, 584, 55 S. Ct. 538, 540, 79 L. Ed. 1071, 1073.) Due process imposes no rigid rule of equality in taxation, and irregularities resulting from singling out one particular class for taxation or exemption infringe no constitutional requirement. (*Carmichael* v. *Southern Coal & Coke Co.,* 301 U.S. 495, 509, 57 S. Ct. 868, 872, 81 L. Ed. 1245, 1253). It is only the invidious discrimination or classification which is patently arbitrary and utterly lacking in rational justification which is barred by the due process or equal protection clauses. *Flemming* v. *Nestor,* 363 U.S. 603, 611, 612, 80 S. Ct. 1367, ... 4 L. Ed. 2d 1435, 1445.

The variety of ways of expressing the rule that a legislative classification for taxation purposes is not violative of the fourteenth amendment if it has a reasonable relation to the subject of the particular legislation so that all persons similarly situated are treated alike, and pertinent citations, are found in 16A C.J.S. Constitutional Law, Sections 520, 521, 649.

In this litigation, as is often the case, the particular expression of the rule which the majority of the court chooses to rely upon may be dictated by the outcome which the judges of the majority think to be proper. Beyond doubt, the fourteenth amendment does not impose on the states an inflexible and technical rule of equal taxation, and the extent to which the states may go in devising a legislative classification for taxation is illustrated by the statement of the Supreme Court in *Lawrence* v. *State Tax Commission of Mississippi*, 286 U.S. 276, 284, 285, 52 S. Ct. 556, 559, 79 L. ed. 1102, 1108:

> "The equal protection clause does not require the state to maintain a rigid rule of equal taxation, to resort to close distinctions, or to maintain a precise scientific uniformity; and possible differences in tax burdens not shown to be substantial or which are based on discriminations not shown to be arbitrary or capricious, do not fall within constitutional prohibitions."

The Supreme Court in *Lawrence* also stated that there is no constitutional requirement that a system of taxation should be uniform as applied to individuals and corporations, regardless of the circumstances in which it operates (286 U.S. 276, 283, 52 S. Ct. 556, 558, 76 L. ed. 1107), and we have just recently held that for the purpose of income taxation, corporations may be placed in one class and individuals in another and each taxed differently. (*Thorpe* v. *Mahin*, 43 Ill. 2d 36.) The language of the court at pages 45 and 46 is worthy of repetition:

"It is next contended that the Act violates the uniformity provision of Section 1 of Article IX of our constitution and the equal protection and due process requirements of the fourteenth amendment to the United States constitution by creating multiple classes and discriminating unreasonably among them. This contention is advanced specifically against the provisions which tax corporations at a 4% rate and individuals, trusts, and estates at 2½% rate.

"Both the equal protection argument and the uniformity argument depend on the reasonableness of putting corporations in one class and individuals, trusts, and estates in another class for purposes of this tax. (See *Grenier & Co.* v. *Stevenson,* 42 Ill. 2d 289). When the due process contention has been advanced, this court, citing Supreme Court cases, has stated: 'It has long been settled that the power of the legislature to make classifications, particularly in the field of taxation, is very broad, and that the fourteenth amendment imposes no "iron rule" of equal taxation. (Citations.) The reasons justifying the classification, moreover, need not appear on the face of the statute, and the classification must be upheld if any state of facts reasonably can be conceived that would sustain it. (Citations.) The burden therefore rests on one who assails the statute to negate the existence of such facts. (Citations.)' *Department of Revenue* v. *Warren Petroleum Corp.,* 2 Ill. 2d 483, 489-490.

"When the uniformity contention has been advanced this court has stated: 'It is well established that the legislature has broad powers to establish reasonable classifications in defining subjects of taxation. * * * Such classification must, however, be based on real and substantial differences between persons taxed and those not taxed. (Citations.)' (*Klein* v. *Hulman,* 34 Ill. 2d 343, 346-347.) 'In order to prevail on an allegation that a statute or portion of a statute is unconstitu-

tional, the plaintiff has the burden of showing how the legislature has violated the constitution.' *Grenier & Co.* v. *Stevenson,* 42 Ill. 2d 289, 291.

"In short, petitioners have the burden of showing that the challenged classification is unreasonable. Their only assertion is that 'corporations are at a disadvantage when they compete in the same type of business with individual proprietorships or partnerships because of the rate differential.' This assertion has been rejected by the Supreme Court as to a Federal tax (*Flint* v. *Stone Tracy Co.,* 220 U.S. 107, 31 S. Ct. 342, 55 L. Ed. 389), and as to a State tax (*Fort Smith Lumber Co.* v. *Arkansas ex rel. Arbuckle,* 251 U.S. 532, 40 S. Ct. 304, 64 L. Ed. 396), and by this court (*People* v. *Franklin National Insurance Co. of New York,* 343 Ill. 336; *Michigan Millers Mutual Fire Insurance Co.* v. *McDonough,* 358 Ill. 575), where, for purposes of the tax in question, corporations were placed in one class and individuals in another and each were taxed differently."

The majority, however, holds that as to a property tax the classification for exemption or taxation may not be based upon the character of the ownership, but only upon the nature of the property itself. Thus, the majority is of the opinion that the classification may not be based upon the corporation—individual distinctions which we upheld in *Thorpe.*

In *Thorpe* this court reversed its prior holding that income is property (*Bachrach* v. *Nelson,* 349 Ill. 579), and held that an income tax was not a property tax. The significance of this determination was that Section 1 of Article IX of our Constitution of 1870 required the levying of a tax "by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property * * *." At the same time, the constitutional

provisions permitted a tax upon franchises and privileges in such manner as the legislature might direct, so long as it was uniform as to each "class." Obviously, the legislature could not, under the foregoing provisions, impose an income tax upon corporations at one rate and upon individuals at a lesser rate if it were a tax on property. Our constitution then prohibited any tax on property unless structured to be uniform as to valuation.

After reaching the conclusion that an income tax was not a property tax, the court faced no barrier in upholding the Illinois Income Tax Act. In the case at bar, after Article IX-A amendment to the Constitution of 1870 was adopted, the uniformity provisions of Section 1 of Article IX were no longer effective as to the taxation of personal property of individuals, and the court should have found no impediment to upholding the validity of Article IX-A and the abolishment of this tax as to individuals.

Constitutional provisions requiring property to be taxed uniformly in proportion to its value are not uncommon to the states. In the California Railroad Tax cases (*San Mateo County* v. *Southern Pacific R. Co.*, 13 Fed. 722, appeal dismissed per stipulation, 116 U.S. 138; *Santa Clara County* v. *Southern Pacific R. Co.*, 18 Fed. 385, aff'd other grounds, 118 U.S. 394), which held that unequal taxation, based upon the character of the owner, was forbidden by the fourteenth amendment, a constitutional provision requiring uniformity of taxation was involved. Even though the California constitution specified that all property be taxed in proportion to its value, a state statute especially provided that as to railroad properties only, the amount of a mortgage on the real estate was not to be deducted in ascertaining the value of the real estate for taxation pur-

poses. The trial court quite properly held that this method of valuation, as to railroads only, was improper under the circumstances, and the United States Supreme Court affirmed the lower court on a non-constitutional basis without reaching the constitutional question. The California Railroad Tax cases should be read, with cognizance, that the state constitution required all property to be taxed in proportion to its value, and that the cases arose at a time when it was necessary to establish that the word, "persons" as used in the fourteenth amendment, included corporations. Apparently, the latter point had a strong bearing on the expressions found in these cases.

In the case at bar, by virtue of the adoption of Article IX-A, there is no constitutional requirement that taxes on personal property be uniform as to individuals and corporations so that each pays a tax in proportion to the value of his or its property. Article IX-A, which we are called upon to consider, eliminated this requirement; it provides that "the taxation of personal property is prohibited as to individuals." Thus, the case at bar is a far cry from one in which the legislature is attempting to discriminate between individuals and corporations in the face of a constitutional provision prohibiting such discrimination. Here the question for determination is whether, absent the requirement of a state constitution that corporate and individual personal properties be taxed the same, the equal protection clause of the fourteenth amendment permits them to be taxed differently? I believe that it does!

Without the constitutional requirement of uniformity on the taxation of properties, there is no reason or justification in the case at bar for stating that personal property taxation may not be classified on the basis of the ownership of the property. The Constitution of 1870, as

amended by Article IX-A, does not so provide, and the Constitution of 1970 suggests the contrary. Article IX of the Constitution of 1970 relates to revenue, and Section 5 thereof pertains to personal property taxation. Subsection (a) thereof provides that the legislature "may classify personal property for purpose of taxation by valuation, abolish such taxes on any or all *classes* and authorize the levy of taxes in lieu of the taxation of personal property by valuation." (Emphasis ours.) Without more, it could be said that the word "classes" refers only to classes of property, but subsection (c) refers to the abolition of all ad valorem personal property taxes by January 1, 1979, and the replacement of the lost revenue, and provides: "Such revenue shall be replaced by imposing statewide taxes, other than ad valorem taxes on real estate, solely on those *classes* relieved of the burden of paying ad valorem personal property taxes because of the abolition of such taxes subsequent to January 2, 1971." (Emphasis ours.) Obviously, the word "classes" as there used, does not refer to classes of property; it refers to classes of property owners, and provides for taxation according to the character of the owner. If the majority opinion is to stand and Article IX-A held to be unconstitutional, then under consistent application of its rationale, subsection (a) of Section 5 of the new constitution is likewise unconstitutional.

The majority opinion chose to rely upon the rationale of *Quaker City Cab Co.* v. *Commonwealth of Pennsylvania*, 277 U.S. 389, 48 S. Ct. 553, 72 L. Ed. 927. I believe that the elucidation and logic of the dissent of Mr. Justice Brandeis, in which Mr. Justice Holmes concurred, offers the better reason. Therein, Mr. Justice Brandeis made some observations which are particularly apropos here. The court had

under consideration a tax on the gross receipts of corporate taxicab companies where no similar tax was imposed upon the receipts of individuals who operated taxicabs. The majority held that the classification was based solely upon the character of the owner, and that it violated the fourteenth amendment.

In his dissenting opinion, 277 U.S. 389, 403-412, 48 S. Ct. 553, 555-558, 72 L. Ed. 927, ——, Mr. Justice Brandeis observed that the tax applied equally to all corporations, foreign and domestic. He stated that the fundamental question before the court was:

> "Does the equality clause prevent a state from imposing a heavier burden of taxation upon corporations engaged exclusively in intrastate commerce, than upon individuals engaged under like circumstances in the same kind of business? The narrowed question presented is whether this heavier burden may be imposed by a form of tax 'not peculiarly applicable to corporations'; that is, by a tax of such a character that it might have been extended to individuals if the Legislature had seen fit to do so."

He pointed out that the difference between a business carried on in corporate form and one carried on by natural persons is "a real and important one." He observed that the discrimination was not based upon any difference in the source of income or in the character of the property employed, and stated the obvious: that the requirement that a classification must be reasonable does not imply that the policy embodied in the classification must be deemed by the court to be a wise one. He concluded that a state is permitted to impose upon corporations more than their pro rata share of the burden of taxation, and that nothing in the Federal constitution prohibits this.

It seems that this is exactly what we held in *Thorpe* v. *Mahin*, 43 Ill. 2d 36. We recognized what we called the obvious advantages of carrying on a business in the corporate form. The privilege of carrying on a business in this form has many advantages: the corporate ownership of property, freedom from personal liability for corporate obligations, continuity of existence, etc. There we acknowledged that there are sufficient differences between the privilege of earning or receiving income as a corporate entity and that of earning or receiving income as an individual, to justify the variance in tax rates between the individual and the corporation, and here we should recognize that there are sufficient differences between the privilege of owning property as a corporate entity and the privilege of owning it as an individual to justify the exemption in the case of the individual property owner. The fact that the corporation may in some respects be placed at a disadvantage in its competition with individuals owning similar property and engaged in the same business should not condemn the classification as unreasonable. *Thorpe* v. *Mahin*, supra, 46.

There is no more compelling reason to suggest that the classifications for personal property tax purposes must be based upon the nature of the property than there is to suggest that the classifications for income tax purposes must be based on the source or type of income to be reported. The Article IX-A constitutional amendment creates a classification based upon the distinctions inherent between corporations and individuals—a distinction which we have recognized and upheld as valid under the equal protection clause requirement of the fourteenth amendment in *Thorpe* v. *Mahin*.

Another matter is worthy of mention in our consideration of this case. The evils and the inequities in the administration of the personal property tax collections in this State are known to everyone. That these inequities apply with equal force to corporate taxpayers and individual taxpayers may, or may not, be totally true. The desire and purpose of systematically eliminating this archaic form of taxation are apparent from the actions of the people and the legislature of the State. The General Assembly, which drafted and adopted Senate Joint Resolution No. 30, had previously at the same legislative session already exempted from such taxation, household furniture and one automobile, per household, used for personal pleasure. (Ill. Rev. Stat. 1969, ch. 120, par. 500.21a.) The Article IX-A amendment was overwhelmingly ratified by the people of the State. The Constitution of 1970, likewise adopted by the vote of the people, expressed their concern over the form and use of personal property taxation. The newly-adopted constitution prohibits the reinstatement of any ad valorem personal property tax abolished before July 1, 1971, the effective date of the new constitution. This provision refers to the personal property tax as to individuals which was abolished by Article IX-A, and the majority opinion runs counter to this constitutional prohibition in that it reinstates the personal property tax as to individuals. In addition, the new constitution provides that all ad valorem personal property taxes shall be abolished on or before January 1, 1979.

The obvious spirit of the Article IX-A amendment, the will of the people, as expressed by its adoption, and the intent and purpose of the legislature, should not be thwarted unless a construction to this effect is required. Thus, it is very appropriate that we consider the mischief

sought to be remedied and the purpose to be accomplished by the Article IX-A amendment. (*Wolfson* v. *Avery*, 6 Ill. 2d 78, 88). Likewise, the court should memorialize the salutary rule of law that an amendment to a state constitution should be deemed violative of the Federal Constitution only where the asserted constitutional rights cannot otherwise be protected and effectuated. *Reynolds* v. *Sims*, 377 U.S. 533, 584, 84 S. Ct. 1362, ——, 12 L. Ed. 2d 506, 540.

After considering the background of this constitutional amendment and the purpose which it, along with the other contemporary legislative enactments and constitutional adoptions seeks to accomplish, I believe that the classification found in the Article IX-A amendment does not constitute an invidious discrimination; that it seeks to accomplish and promote a valid policy expressive of the will of the people and the intent and purpose of the legislature; and that the distinction upon which the classification for exemption is based does not overstep the limitations imposed by the fourteenth amendment.

SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM A.D. 1973

No. 73-390

CLEMENS K. SHAPIRO, et al.,

Petitioners,

vs.

CHARLES J. BARRETT, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR RESPONDENTS IN OPPOSITION

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On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW.

The opinion of the Illinois Supreme Court (App. "B" of Petition) is reported at 54 Ill.2d 237, 296 N.E.2d 342.

REASONS FOR DENYING THE WRIT.

(1) Petitioners, who are natural persons owning personal property for their own personal enjoyment or in the operation of a sole proprietorship, clearly do not represent fiduciaries and their beneficiaries; and fiduciaries, both corporate and individual, and their beneficiaries are not now and have never been, at any stage of the proceedings in the State Trial Court, the Illinois Supreme Court, or in the proceedings before this court, a party nor represented by a party.

(2) The allowance of the writ would be inconsistent with this Court's settled refusal to entertain a petition by parties (the natural person and sole proprietor petitioners herein) in whose favor the final judgment in the State court of last resort was rendered, i.e., exemption from the imposition of ad valorem personal property taxes.

(3) Petitioners have failed to specify the stage in the proceedings in the court of first instance and the appellate court, at which, and the manner in which, they raised the federal questions sought to be reviewed, as required by Rule 23, Paragraph 1(f) of the Rules of the Supreme Court of the United States.

STATEMENT.

The following statement of the case is made in order to correct omissions in the statement filed by petitioners:

The parties in *Lehnhausen* v. *Lake Shore Auto Parts Co.*, No. 71-685, consolidated with *Edward J. Barrett, Clerk of Cook County, et al.*, petitioners, v. *Clemens K. Shapiro, et al.*, respondents, No. 71-691, as set forth in the opinion of this Court in 409 U.S. 1103, and in the prior opinion of the Illinois Supreme Court in *Lake Shore Auto Parts Co.* v. *Korzen*, 49 Ill.2d 137 (July 1971) were:

Plaintiffs:

Clemens K. Shapiro (one of the Petitioners herein), a natural person, owning personal property in his own name and owning real property jointly with his wife, none of which property is owned or used in the operation of or for purposes of business, and all of which property is owned and used for his personal enjoyment and that of his family.

Jerome Herman (the other Petitioner herein), a sole proprietor, d/b/a The Spot, a natural person who owns and operates a business as a sole proprietor.

Guy S. Ross and Eugene D. Ross, natural persons operating a business, as a partnership, which owns personal property.

M. Weil & Sons, Inc., an Illinois corporation, the owner of personal property.

Lake Shore Auto Parts Co., an Illinois corporation, the owner of personal property.

Eugene Maynard, a natural person, also acting on behalf of one high school district and three grade school districts.

Defendants:

Robert J. Lehnhausen, Director, Department of Local Government Affairs of the State of Illinois.

Edward J. Barrett, County Clerk.
P. J. Callerton, County Assessor.
Bernard J. Korzen, County Treasurer.
George E. Keane, Member of the County Board of Tax Appeals.
Harry H. Semrow, Member of the County Board of Tax Appeals.

On March 29, 1973, petitioner Clemens K. Shapiro, in a verified petition filed with the trial court, alleged that the individuals who were members of his class were exempt from tax and entitled to refunds. (Supp. R. 1-3)

On June 15, 1973, Jerome Herman similarly alleged, in an unverified petition, that the members of his class (sole proprietors) were exempt from personal property tax and entitled to refunds. (Supp. R. 6-10)

On August 10, 1973, following the issuance of the supplemental opinion by the Illinois Supreme Court on remand from the Supreme Court of the United States, the trial judge in the Circuit Court of Cook County, Illinois, entered orders finding that the individuals constituting members of the Shapiro class of natural persons and the Jerome Herman class of natural persons doing business as sole proprietors were exempt from the personal property tax and entitled to refunds of personal property taxes paid for 1971 and subsequent years. (Supp. R. 14-16 and 20-22)

On May 4, 1973, certain fiduciaries, both corporate and individual, and their beneficiaries filed a complaint in the Circuit Court of Cook County, entitled *Harding et al. v. Kluczynski et al.*, Case No. 73 L 4728, (Supp. R. 26-38) alleging therein, among other things, that there were not parties to or represented as members in the consolidated *Shapiro v. Barrett* litigation, and that the supplemental

opinion of the Illinois Supreme Court on remand from this Court was not binding on them; and that:

> **"unless plaintiffs and the class members they represent are declared exempt from taxation under Article IX-A, plaintiffs and their respective class members will unjustly and arbitrarily be denied equal protection of the law in contravention of Article 1, Section 2 of the Illinois Constitution of 1970 and the Fourteenth Amendment to the United States Constitution by reason of the fact that the tax, although assessed in the name of the fiduciary, is not against the fiduciary but against the beneficiary, minor, incompetent, heir or legatee, all of whom are natural persons, the fiduciary being the mere conduit through which the tax upon the property of a natural person is levied. More specifically, a tax would thus be imposed on personal property of an incompetent held by a conservator, which, if held directly by a competent adult, would be exempt from tax; a tax would be imposed on personal property of a decedent's estate during the period of administration, while the same personal property if held directly by the heir or legatee, would be exempt from tax; and a tax would be imposed on personal property held by a fiduciary for the use or benefit of natural persons, while the same personal property if held directly by said natural persons would be exempt. The effect of the foregoing would be to burden unjustly those natural persons least capable of enduring such tax, i.e., widows, children, the infirm, the aged and the incompetent—when the identical personal property held directly by other natural persons escapes tax completely. As so construed, the entire Article IX-A would be void and illegal and of no force and effect whatsoever."**

Said *Hanley v. Kaeper* proceeding, docketed as Case No. 79 L 6728, is still pending in the Circuit Court of Cook County.

ARGUMENT.

I.

A party cannot invoke the jurisdiction of this Court to vindicate asserted federal rights of absent third persons.

The rule of fundamental importance, with which all jurisdictions are in full agreement, is that a person who is seeking to raise the question as to the validity of a discriminatory statute has no standing for that purpose unless he belongs to the class which is prejudiced by the statute. As this Court stated in the case of *Roberts & Schaefer Company* v. *Louis L. Emmerson, as Secretary of State for the State of Illinois, et al.*, 271 U.S. 50, 54 and 55; 70 L.Ed. 827, involving an Illinois corporation and the imposition of a state franchise tax on a domestic corporation, measured by its authorized capital stock:

> "But the plaintiff is not in a position to raise this question. As this court has often held, one who challenges the validity of state taxation on the ground that it violates the equal protection clause, cannot rely on theoretical inequalities, or such as do not affect him, but must show that he is himself affected unfavorably by the discrimination of which he complains. (Citation of cases omitted.) The plaintiff cannot complain that the tax is measured by authorized, instead of issued, capital stock, because all of its authorized capital stock has been issued. Any discrimination that exists operates, therefore, in plaintiff's favor."

See also *Wilder Tileston* v. *Abraham S. Ullman, State's Attorney, et al., of the City of New Haven*, 318 U.S. 44, 45, 87 L.Ed. 603. wherein this Court stated:

> ". . . There is no allegation or proof that appellant's life is in danger. His patients are not parties to this proceeding and there is no basis on which we can say that he has standing to secure an adjudication of his patients' constitutional right to life, which they do not assert in their own behalf. . ."

See also *Barrows* v. *Jackson*, 346 U.S. 249, 97 L.Ed. 1586; *First National Bank* v. *Louisiana Tax Com.*, 289 U.S. 60, 77 L.Ed. 1030; and *Shearer* v. *Burnet*, 285 U.S. 228, 76 L.Ed. 724.

The controlling question is whether the petitioner ". . . has sustained or is immediately in danger of sustaining some direct injury as the result of its [the Statute's] enforcement . . ." *Massachusetts* v. *Mellon*, 262 U.S. 447, 488; 67 L.Ed. 1078. Clearly neither Clemens K. Shapiro, the natural person, nor Jerome Herman, the natural person, d/b/a The Spot, nor any member of their respective classes are in any danger of sustaining any injury—on the contrary, the final judgment of the Illinois Supreme Court on remand has confirmed their exemption from the imposition of ad valorem personal property taxes; and the trial court, in accord therewith, has found and ordered on August 10, 1973, that both the individuals who are members of the class represented by Clemens K. Shapiro and the natural persons who own personal property and do business as sole proprietors, are entitled to refunds of the personal property taxes paid by them, and each of them, for the year 1971 and subsequent years.

The obvious fact here is that petitioners cannot represent natural persons and sole proprietors, and at the same time also represent fiduciaries and beneficiaries since "all members of a class must have a common right or

interest and the representation must be for the common benefit of all and cannot be to the injury of any." *Weberpals* v. *Jenny*, 300 Ill. 145. See also *Dierks* v. *Thompson*, 414 Fed.2d 453, 456 (1st Cir. 1969); *South East Nat. Bank* v. *Board of Education*, 298 Ill. App. 92, 127, 128; 18 N.E. 2d 584, 598. The conflict of interest is readily apparent here where the alleged violation of federal rights of fiduciaries and beneficiaries would, if successful, render Article IX-A to the Illinois Constitution of 1870 unconstitutional and void, thereby reimposing the personal property tax on natural persons and sole proprietors who have already been declared by the Illinois Supreme Court to be exempt from personal property taxes and entitled to refunds.

The record is abundantly clear that neither a fiduciary (corporate or individual) nor a beneficiary has ever been a party in the *Lehnhausen* v. *Lake Shore Auto Parts Co.* consolidated with *Edward J. Barrett* v. *Shapiro* proceedings, nor represented by any of the parties to said proceedings.

II.

A writ of certiorari is not granted to a petitioner in whose favor a judgment has been entered.

We would also point out to this Court that to grant the writ of certiorari here petitioned for by Clemens K. Shapiro and Jerome Herman and their respective classes, would be wholly inconsistent with this Court's settled refusal to entertain an appeal by a party in whose favor the lower court rendered its judgment. See *Public Service Commission* v. *Brashear Lines*, 306 U.S. 204, 206; 83 L. Ed. 608.

III.

The requirements of Rule 23, Paragraph 1(f) of the Rules of the Supreme Court of the United States are jurisdictional.

The party invoking this Court's jurisdiction has the burden, as Rule 23, Paragraph 1(f) states, to: ". . . specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and in the manner in which, the federal questions sought to be reviewed were raised; . . ."

Petitioners have not, and cannot, meet this burden by reason of the simple, obvious fact that, never having represented fiduciaries or beneficiaries, there was never, nor could there have been, any occasion or entitlement to timely raise federal constitutional issues of such absent third persons (that is, fiduciaries and beneficiaries).

Petitioners made no allegations challenging the validity of Article IX-A on the ground that it denies equal protection of the laws to fiduciaries and beneficiaries at the trial court level in their complaint; or before the Illinois Supreme Court on appeal from the trial court order; or in the proceedings before this Court, reported in 409 U.S. 1103; nor in the Suggestions and Memorandum filed with the Illinois Supreme Court upon remand from this Court. The first suggestion of this federal question as it relates to fiduciaries and trustees was made by petitioners in their petition for rehearing following the issuance by the Illinois Supreme Court of its supplemental opinion after remand from this Court.

The Supreme Court of Illinois has repeatedly held that constitutional claims cannot be raised for the first time at

the appellate level, much less on a petition for rehearing in connection with a supplemental opinion after remand from the Supreme Court of the United States. *The People* v. *Mallett* (1970), 45 Ill.2d 388; 259 N.E.2d 241; *The Railway Passengers and Freight Conductors' Mutual Aid and Benefit Association* v. *Anna Leonard* (1879), 166 Ill. 154; 46 N.E. 756.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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vs.

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Respondents.

REPLY OF PETITIONERS

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REPLY OF PETITIONERS

This case is presented to this Court for the second time. In *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 409 U.S. 1103, this Court in reversing the Illinois Supreme Court said "that making corporations and other like entities liable for ad valorem taxes on personal property but not individuals does not transcend the requirements of equal protection." (App. 8)

Petitioners contend that the direction of this Court to the Illinois Supreme Court was misapprehended and unconstitutionally applied because the Illinois Supreme Court while exempting natural persons owning personal property

—however, and unconstitutionally, continued to impose personal property tax on natural persons owning personal property for the sole reason that such property is held for those persons either in conservators, guardians, trustees, or other fiduciaries.

Natural persons owning personal property subject to that tax were at all times before the lower courts and this Court. Those natural persons are all members of the class of these petitioners.

The record plainly discloses that the original complaint of petitioners, plaintiffs, in the trial court alleged, inter alia:

> Members of the class represented before this Court are admitted by those plaintiffs to include, and are limited to include, all others affected by Amendment Article IX, § 4 to Illinois Constitution of 1870, in regard to all that amendment which those plaintiffs are not limited to non-citizens of this State, those residents of the business of this State, and those owning of the property as provided in Section 116 of Illinois Revenue Act of 1939, ch. 120, Sec. 687, et seq. [1] Rev. Stat. 1969).

Section 116 [1] Rev. Stats. 1971, ch. 120) enumerates who must list personal property in Illinois and specifically enumerates the group most interested in this petition for certiorari, to wit, trustees, minors, trustees, clerks, businesses of trusts, and persons and heirs of deceased persons. See Appendix I hereto.

It is patent from the pleadings and throughout the proceedings both in the trial court and in the Illinois Supreme Court, as well as in the proceedings before this Court, all as disclosed by the record herein, that petitioners plaintiffs, at all times, represented those persons who are petitioners here—the natural person beneficiaries of trusts, estates, etc. The plaintiffs in this case, at all times

have included "all others affected by Amendment Article IX A" including "those required to list property as provided in Section 538." 54 Ill. 2d 237.

Moreover, Illinois' Attorney General rendered an official opinion concerning the scope and encompassment of Article IX A, embraced and adopted by petitioning plaintiffs, and that opinion answered for defendant state officials the taxable status of trusts, and estates and their beneficiaries as far as the Attorney General was concerned. The opinion of the Attorney General was an integral part of this case from its inception and became the focal point of his argument to this Court and that of these petitioners in the first appeal to this Court. (See Am. Pet. for Cert. in Appeal No. 71-695, App. D, pp. A 41-47)

The Illinois Supreme Court would not have ruled on the question of the rights of individuals who are minors, beneficiaries of trusts, etc., if petitioners here did not "bring themselves within the class of persons allegedly discriminated against." *I.E.M. v. Korshak*, 34 Ill. 2d 595, 608, 217 N.E. 2d 794, 800 (1966), *Hoodin v. Korshak*, 39 Ill. 2d 521, 536 N.E. 2d 897, 901 (1968).

If those cases alone are not persuasive authority for the proposition that the Illinois Supreme Court will not rule on a matter unless the parties are before it, and the logical inference flowing therefrom, that when the court determines rights of parties to the case those parties are in fact before the court, then the State's Attorney's own pleadings in the *Hoodin* case demonstrate conclusively that the defendants created these issues as being directly presented to, and before the Illinois Supreme Court and, indeed, adjudicated and determined by that Court.

The motion of the county respondents, defendants in *Hoodin*, to dismiss the complaint (attached as Exhibit II)

demonstrates respondents' assertions of the *res judicata* effect of the Illinois Supreme Court decision sought to be reviewed here. However, the defendants now argue contrary to their own representations in the Illinois trial courts that the *res judicata* decision of the Illinois Supreme Court is based on the absence of the parties vitally interested in that determination (petitioners herein).

Frankly, petitioners are non-plussed at the obviously resentful posture purported at this late date by respondents, which posture is patently gainsaid by the record in this case, and bespeaks a purpose and motivation contrary to that heretofore represented by all parties to this Court and the Courts below, to wit: to obtain the most immediate and most comprehensive resolution of all the vexatious and serious problems inherent in this litigation, the finality of which litigation is of such great import and consequence to both the revenue of the State of Illinois and its citizens-taxpayers as well.

Respondents have abandoned these objectives. Respondents have foresaken these principles and these concerns.

Respondents urge now that this Court should ignore disservice to this Court's mandate—that the State of Illinois and its citizens should continue submerged in the unrealistic and constitutionally offensive classification emergent from the lower court's supplemental opinion issued subsequent to this Court's remandment—that Illinois and its citizens should not be entitled to an immediate resolution of this issue—but, to the contrary, the State of Illinois and its citizens should remain in this state of uncertainty until some other case, presently in one of Illinois' trial courts wends its way over months and possibly years to reach the point and present the issues before this Court, that are present this day in this proceeding.

The constitutional issue asserted here by petitioners arises because of the Illinois Supreme Court opinion and therefore could not have arisen earlier or been presented earlier. While petitioner Shapiro has asserted from the inception of this litigation that the exemption of "individuals" included natural persons, and Herman contended that only corporations remained taxable and individuals embraced everyone but corporations—the same position the Attorney General took in his official opinion—the Illinois Court, after reversal and remand, split the individual class into fractions, exempting Herman's class of natural person sole proprietors and Shapiro natural persons to the extent that they owned personal property in their individual non-business capacity, but continued the tax on Shapiro natural persons who owned property as beneficiaries of trusts and estates minors, incompetents, etc.

It is incredible to believe that the State's Attorney of Cook County could or would argue at this late stage in these proceedings for the absence of jurisdiction in the Illinois Supreme Court to decide an important constitutional question involving all trusts, estates and fiduciary relationships in the State of Illinois. That court has decided that issue. These petitioners were before that court. The record so proves.

There simply is no question but that these petitioners, not only have standing to, but, indeed, it is their duty to this Court to protect the mandate of this Court from misapplication by the Illinois Supreme Court, which misapplication makes this Court's mandate offensive to the "equal protection" clause of the 14th Amendment to the Constitution of the United States.

The misrepresentations implicit in the brief of the respondents are serious and most unlawyerlike. At no time throughout the history of this case have the respondents ever alleged that the Illinois Supreme Court, or any other

Illinois Court, lacked the authority in these proceedings to conclusively determine the rights of all estates and trusts, and their beneficiaries, to an exemption under Article IX-A from the Illinois personal property tax.

The appendices attached hereto and full and complete proof against all of respondents contentions.

Illinois Attorney General, like these petitioners, desires now as both have throughout these proceedings a most immediate resolution. Illinois Attorney General does not resist this petition.

To now seek to deny a petition to this Court, not on the merits, not on an argument of lack of jurisdiction over a question of state law, but by the intimation that petitioners cannot now raise these issues in this Court, is ground alone for this Court to exercise more than its usual scrutiny and compels the relief sought by these petitioners.

For these reasons, and those already presented in the petition for writ of certiorari, this Court should grant its writ and reverse the judgment appealed from.

Respectfully submitted,

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APPENDIX

APPENDIX I

§ 534. Who lists personal property (Ill. Rev. Stats. 1971, Ch. 120)

Personal property shall be listed in the following manner:

(1) Every person of full age and sound mind, being a resident of this State, shall list all his moneys, credits, bonds or stocks, shares of stock of joint-stock or other companies (when the capital stock of such company is not assessed in this State), moneys loaned or invested, annuities, franchises, royalties and other personal property.

(2) He shall also list all moneys and other personal property invested, loaned or otherwise controlled by him as the agent or attorney, or on account of any other person or persons, company or corporation whatsoever, and all moneys deposited, subject to his order, check or draft, and credits due from or owing by any person or persons, body corporate or politic.

(3) The property of a minor child shall be listed by his guardian; if he have no guardian, then by the father, if living; if not, by the mother, if living; and if neither father nor mother be living, by the person having such property in charge.

(4) The property of an idiot or lunatic, by his conservator; or if he has no conservator, by the person having charge of such property.

(5) The property of a person for whose benefit it is held in trust, by the trustee; of the estate of a deceased person, by the executor or administrator.

(6) The property of corporations whose assets are in the hands of receivers, by such receivers.

(7) The property of a body politic or corporate, by the president, or proper agent or officer thereof.

(8) The property of a firm or company, by a partner or agent thereof.

(9) The property of manufacturers and others in the hands of an agent, by and in the name of such agent, as merchandise.

APPENDIX II

MOTION TO DISMISS FILED AUGUST 23, 1973

Come now Stanley T. Kusper, Jr., County Clerk of Cook County, Illinois, Bernard J. Korzen, County Treasurer and *ex-officio* County Collector of Cook County, Seymour Zaban and Harry H. Semrow, Members of the Board of Appeals of Cook County, and P. J. Cullerton, County Assessor of Cook County, defendants in the above entitled cause, by their attorney, Bernard Carey, State's Attorney of Cook County, Illinois, and in support of their Motion to Dismiss, state as follows:

1. That plaintiffs have filed this declaratory judgment suit, individually and in a representative capacity on behalf of all those who are members of the classes of trustees, fiduciaries and beneficiaries which plaintiffs represent.

2. That the Supreme Court of Illinois considered the classes which are represented by the instant plaintiffs in the context of Illinois personal property taxation in its supplemental opinion of April 25, 1973, in *Lake Shore Auto Parts, Inc.* v. *Korzen,* cons. (Docket No. 44199). The Court stated in part:

> "The personal property thus left subject to taxation under Article IX-A includes the following categories of ownership: partnerships, joint ventures, professional associations and professional service corporations. Trustees and fiduciaries, whether corporate or not, do not own property as natural persons, and they were not exempted from taxation by Article IX-A."

3. That plaintiffs cite in their complaint this language of the Illinois Supreme Court, but contend that it is not

binding upon them or the classes which they represent because they were not represented as parties or members of the class in *Shapiro* v. *Barrett* (No. 71 L 5745), consolidated with the *Lake Shore* case. However, this same issue was raised in original *Lake Shore* proceedings before the Illinois Supreme Court and the Court there held that it is not necessary that all persons being affected must be represented as parties to the action, stating at 49 Ill. 2d 144-145:

> "The plaintiffs in the Maynard and Shapiro cases justify the institution of their actions upon the ground that there are deficiencies as to parties and as to legal propositions in the Lake Shore case which might, without the assistance which they volunteer to supply, preclude the possibility of full consideration of the issues by this court. That it is not necessary that each person or group of persons favorably or unfavorably affected by a legislative classification be made parties to an action challenging the validity of that classification is apparent. Major cases involving discrimination of the sort here alleged have not required the presence, as parties, either in person or by representative of all those affected. See, e.g., *Lawrence* v. *State Tax Com. of Miss.* (1932), 286 U.S. 276, 76 L. Ed. 1102, 53 S. Ct. 556." 49 Ill. 2d at 144-145.

4. That the very theories which are presented in the instant complaint were also submitted to the Illinois Supreme Court for its consideration prior to the issuance of its supplementary opinion by William R. Dillon, one of the counsel for the present plaintiffs. Included as Appendixes I and II to this Motion to Dismiss are copies of the suggestions in the nature of a Brief as *amici curiae* and the supplement to these suggestions filed by Mr. Dillon. Therefore, the Illinois Supreme Court was fully aware of the issues involving the instant classes, and, as such, the classes

represented by the plaintiffs were not prejudiced by their failure to be included as parties to the litigation.

Wherefore, the defendants to this cause, by their attorney, Bernard Carey, State's Attorney of Cook County, Illinois, respectfully submit that the instant complaint must be dismissed for failure to state a cause of action in view of the fact that the Illinois Supreme Court has determined, after being fully advised of the position of fiduciaries and trustees, that said classes are not exempted from personal property taxation by Article IX-A.